

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICKEON J. WASHINGTON,

Defendant-Appellant.

UNPUBLISHED

March 20, 2003

No. 237175

Wayne Circuit Court

LC No. 01-000398-01

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to two years' imprisonment on the felony-firearm, five months to five years on the CCW convictions, and thirty-eight months to ten years in prison on the assault with intent to do great bodily harm conviction. We affirm, but remand for correction of the judgment of sentence.

The evidence reveals that before the night of the shooting, the victim and defendant had a hostile relationship. At trial, the victim testified that on the night he was shot, he was standing in the street waiting to get into a parked car when defendant drove up and started arguing with him. According to the victim, after exchanging words, defendant pulled a gun and shot the victim in the chest. After being shot and as the victim was running away, defendant continued to shoot at the victim, hitting him once in the buttock and once in the leg. The victim testified that defendant fired a total of nine or ten shots. Defendant claimed self-defense at trial and asserted that the victim threatened him and pulled a gun on him first. Defendant testified that after the victim shot at him, he pulled a gun and began firing back at the victim. The jury convicted defendant of the offenses stated above.

Defendant first argues that the trial court erred in denying defendant's requested jury instruction on the offense of reckless discharge of a firearm, which is a cognate lesser included offense of the assault charge. "We review de novo a claim of instructional error." *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

First, after reviewing the record, we conclude that the trial court did not err in refusing defendant's requested instruction on reckless discharge of a firearm because defendant admitted that he intentionally shot at the victim. Second, in *People v Alter*, ___ Mich App ___; ___ NW2d ___ (Docket No. 228005, issued 1/24/03), slip op pp 2-4, this Court recently decided the issue regarding whether a jury should be instructed on a cognate lesser included offense. Relying primarily on *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), and also citing *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002), the Court in *Alter*, *supra* slip op pp 3-4 & n 1, held that a jury instruction on a cognate lesser included offense is not permissible. Specifically, this Court stated:

This issue is controlled by the Supreme Court's recent opinion in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). There, the Court reasoned that the statute on lesser offenses, MCL 768.32(1), does not authorize consideration of cognate lesser offenses. [*Alter*, *supra* slip op pp 3-4.]

A jury instruction on a cognate lesser included misdemeanor is also precluded. *Cornell*, *supra* at 359.

Next, defendant argues that insufficient evidence existed to support the verdict of assault with intent to do great bodily harm. We disagree. When reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478, amended 441 Mich 1201 (1992).

The elements of assault with intent to do great bodily harm are (1) an assault, and (2) an intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). "Assault with intent to commit great bodily harm is a specific intent crime." *Id.* Although defendant claims that his actions "do not give rise to an inference of intent to do great bodily harm," we conclude otherwise.

The testimony in this case revealed that animosity existed between the victim and defendant before the instant shooting. The victim testified that on the night he was shot, he was standing in the street waiting to get into a parked car. According to the victim, defendant drove up to the victim, started an argument then pulled a gun on him. The victim testified that defendant shot him near the area of his heart after the victim attempted to grab the gun. As the victim was running away, defendant continued to shoot, hitting him once in the buttock and once in the left leg. The victim testified that defendant fired a total of nine or ten shots. Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). On the basis of the evidence that defendant used a deadly weapon and repeatedly shot at the victim, hitting him three times, including in the chest, a rational trier of fact could find that the elements of the crime, including intent, were proven beyond a reasonable doubt. *Johnson*, *supra*.

Defendant argues that he is entitled to resentencing because the trial court erred in scoring offense variable (OV) 3.¹ Specifically, defendant contends that OV 3 should have been assessed at ten points rather than twenty-five. We disagree. The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “Scoring decisions for which there is any evidence in support will be upheld.” *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 3 provides that ten points will be assessed when “[b]odily injury requiring medical treatment occurred to a victim” and twenty-five points will be assigned when a “[l]ife threatening or permanent incapacitating injury occurred to a victim.” MCL 777.33(1). After reviewing the record, we conclude that evidence existed to support the trial court’s scoring of OV 3. The trial court properly interpreted the “[l]ife threatening” language contained in OV 3 in relation to the facts of the case, which included the victim suffering three gunshot wounds, one of which was a close range wound to his chest close to his heart. As the prosecutor points out, the victim’s injuries are more easily considered as life threatening thus resulting in twenty-five points than merely an injury that required only medical treatment under the instruction of OV 3 for ten points. Because there is evidence to support the trial court’s scoring of OV 3, we uphold the scoring. Further, because defendant was sentenced within the recommended range of the sentencing guidelines, and he has not established a scoring error or proven that this sentence was based on inaccurate information, the sentence must be upheld. *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Defendant also argues that the trial court erred in ordering his felony-firearm sentence to run consecutively to the two CCW sentences rather than consecutively to the sentence of predicate felony (i.e., assault) only. We agree, and the prosecutor concedes this issue. We remand for a correction of the judgment of sentence.

“A consecutive sentence may be imposed only if specifically authorized by statute.” *People v Nantelle*, 215 Mich App 77, 79; 544 NW2d 667 (1996). Further, a sentence for felony-firearm runs consecutively to the underlying felony only, and a CCW conviction cannot be the underlying felony for a felony-firearm conviction. MCL 750.227b; *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994); *People v Bonham*, 182 Mich App 130, 137; 451 NW2d 530 (1989). The underlying felony in this case was the assault charge. Because no statutory authority exists to allow consecutive sentences between the felony-firearm and the CCW convictions, the felony-firearm sentence should be consecutive to the assault sentence only and concurrent to the CCW sentences.

¹ We note that defendant preserved this issue by challenging the scoring of OV 3 at sentencing. *People v McGuffey*, 251 Mich App 155, 164-166; 649 NW2d 801 (2002).

We affirm, but remand for a correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra